IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LEE F.,

Plaintiff,

v.

Civil Action No.
3:20-CV-1272 (DEP)

KILOLO KIJAKAZI, Acting Commissioner of the Social Security Administration,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

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FOR DEFENDANT

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RAMI VANEGAS, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.[1] Oral argument was heard in connection with those motions on March 23, 2022, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles
U.S. Magistrate Judge

Dated: March 24, 2022
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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LEE F.,

Plaintiff,

vs. 3:20-CV-1272

KILOLO KIJAKAZI, ACTING COMMISSIONER
OF THE SOCIAL SECURITY ADMINISTRATION,

Defendant.
----------x

Transcript of a **Decision** held during a Telephone Conference on March 23, 2022, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and all counsel present by telephone.)

THE COURT: All right. Let me begin by thanking both of you for excellent and spirited presentations, both in written form and during this hearing.

The plaintiff has commenced this proceeding pursuant to 42 United States Code Sections 405(g) and 1383(c)(3) to challenge an unfavorable determination by the Acting Commissioner of Social Security in connection with his application for benefits.

The background is as follows: Plaintiff was born in March of 1987, he is almost 35 years of age, and actually now is 35, having recently had a birthday. He stands 5-foot-9 or 10 inches in height and weighs 380 pounds, qualifying him as obese. Plaintiff lives in Binghamton with his wife and a child, a daughter, who by my calculations is approximately five years of age now. She was one-and-a-half on June 7, 2018. The wife and daughter are both disabled. Plaintiff has a high school diploma and while in school attended regular classes. Plaintiff is right-hand dominant and has a driver's license and drives. Plaintiff last worked in February of 2010 but left that job due to experiencing a job-related injury when he received an electrical shock from some piece of equipment he was operating. While working, he was employed as a residential specialist at the ARC,

Association for Retarded Children.

Plaintiff physically suffers from obesity, mild obstructive sleep apnea, gastroesophageal reflux disorder, or GERD, much easier for me to pronounce, and hypertension. He underwent a craniotomy in 1997 to remove a blood clot. There was no evidence of residual difficulties associated with that surgery.

Mentally, plaintiff suffers from conditions that have been variously diagnosed as general anxiety disorder, obsessive compulsive disorder, or OCD, panic disorder with agoraphobia, and social anxiety. He clearly suffers from anxiety around people and low self-esteem. He has received treatment from UHS Primary Care, principally with Family Nurse Practitioner Melissa Skiadas and Physician's Assistant Michael Feeney. He receives mental health treatment through UHS Health/Binghamton Hospital outpatient mental health where he sees Licensed Clinical Social Worker Megan Hagerbaumer weekly, and has since 2016. Periodically, he also sees Dr. Sobia Mirza, a psychiatrist.

In terms of activities of daily living, plaintiff is capable of dressing, bathing, grooming, does some cooking, laundry, cleaning, he reads, plays video games, plays cards with friends, socializes with friends, cares for his wife and daughter. The daughter apparently does or did need feeding through a food pump every two hours. He takes the daughter

to her medical appointments and he is active on social media.

Plaintiff has been prescribed over time various medications including clonazepam, Paroxetine or Paxil, Abilify, Zoloft, Celexa, Klonopin, Toprol, and omeprazole. The Klonopin apparently has been helpful in calming plaintiff's anxiety, according to him. Plaintiff does not consume alcohol, smoke, or use illicit drugs.

Procedurally, plaintiff applied for Title II and Title XVI benefits in 2012, that was apparently denied. Plaintiff's more recent application was made on January 13, 2018, alleging an onset date of February 9, 2010. It was noted that plaintiff's last date of insured status was December 31, 2013. Plaintiff in his function report claims to suffer from agoraphobia, generalized anxiety disorder, social anxiety, OCD, and depression. The hearing was conducted by Administrative Law Judge Shawn Bozarth on November 5, 2019 to address plaintiff's claim for benefits. On January 13, 2020, ALJ Bozarth issued an unfavorable decision which became a final determination of the agency on August 20, 2020, when the Social Security Administration Appeals Council denied plaintiff's application for review. This action was commenced on October 15, 2020 and is timely.

In his decision, ALJ Bozarth applied the familiar five-step sequential test for determining disability. He first noted that plaintiff had not engaged in substantial

gainful activity since his alleged onset date of February 9, 2010.

He next concluded that plaintiff does suffer from severe impairments that impose more than minimal limitations on his ability to perform basic work functions and specifically general anxiety disorder, obsessive compulsive disorder, panic disorder with agoraphobia, and obesity.

At step three the ALJ concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the Commissioner's regulations. He noted first that although there is no listing corresponding to obesity, he has considered plaintiff's obesity. He also concluded that plaintiff's conditions from a mental point of view do not meet or medically equal Listings 12.04, 12.06, or 12.08.

The administrative law judge next concluded that notwithstanding his impairments, plaintiff retains the residual functional capacity, or RFC, to perform light work as defined in the regulations but limited plaintiff to simple routine and repetitive tasks in low-stress jobs which are jobs that are defined as goal-oriented and which do not have an assembly line, piecework, or numerical production quota pace. He also limited plaintiff to occasional decision making, occasional changes in workplace setting, occasional changes to workplace routine, occasional contact with

supervisors, minimal contact with coworkers, and no contact with customers or the public.

Applying that RFC at step four, the administrative law judge concluded that plaintiff was not capable of performing his past relevant work.

Proceeding to step five, the ALJ first noted that if plaintiff could perform a full range of light work, a finding of no disability would be directed by the Medical-Vocational Guidelines, specifically Grid Rule 202.21. Based on the testimony of a vocational expert, the ALJ concluded that plaintiff is capable of performing work that is available in the national economy, citing as representative positions garment sorter, price marker, and mail clerk, nonpostal, and therefore concluded that plaintiff was not disabled.

The court's task, of course, is to determine two things: Whether correct legal principles were applied by the administrative law judge, and whether substantial evidence supports the resulting determination. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Second Circuit in *Brault v. Social Security Administration Commissioner*, 683 F.3d 443 from 2012, noted that this is an exceedingly deferential standard and under that standard, once an ALJ finds a fact, that fact can be rejected only if a

reasonable fact finder would have to conclude otherwise.

The plaintiff in this case raises three contentions -- really two and then the third is derivative. The first claim of the plaintiff is that the ALJ erred in evaluating the three available medical opinions from Dr. T. Harding, the Social Security agency consultant, nonexamining; Dr. Mary Ann Moore, the examining consultant; and Licensed Clinical Social Worker Megan Hagerbaumer. The primary focus of the argument is on whether plaintiff could meet the on-task and attendance requirements of full-time work. The second argument is addressed to the ability to work occasionally with supervisors, defined as up to one-third of the time, and the third challenges the step five finding because the finding is based on a flawed residual functional capacity finding.

I note as a backdrop that if there are conflicts in the medical evidence on medical opinion evidence in the first instance, provided of course that there is proper explanation to allow for meaningful judicial review, the ultimate determination of which to accept is entrusted to the administrative law judge. *Veino v. Barnhart*, 312 F.3d 578, from the Second Circuit, 2002. Because of the date of filing of plaintiff's most recent application for benefits, this case is governed by the new medical regulations. Under those regulations, the ALJ does not any longer defer to or give any

specific evidentiary weight, including controlling weight, to any medical opinions or prior administrative medical findings. Instead, the ALJ is required to evaluate each of those medical opinions using the relevant factors, principally supportability and consistency. The ALJ is required to articulate how persuasive he or she found each medical opinion and must explain how he or she considered the supportability and consistency of those medical opinions. The ALJ may also, but is not required to, explain how he or she considered the other relevant factors set forth in the regulations including the source's relationship with the claimant, specialization, and other factors that tend to support or contradict the medical opinion. And of course under the new regulations, the term acceptable medical source is expanded. Although there has never been a pronouncement to date from the Second Circuit, I also believe that the Second Circuit's opinion in *Estrella* remains vibrant, meaning that if the court is convinced based on the record as a whole that the regulations have been abided by, the fact that maybe consistency and supportability are not incanted as specific terms does not require remand.

In this case, there are three available medical opinions. The first comes from LCSW Hagerbaumer. It was issued on October 3, 2019, it appears at 577 to 578 of the administrative transcript. In it, Social Worker Hagerbaumer

rates plaintiff as extremely limited in maintaining regular attendance without interruptions from psychological-based symptoms, extreme being defined in the form as there is a major limitation in this area. There is no or very little useful ability to function in this area. Plaintiff is also rated as markedly limited in the ability to perform activities within a schedule, be punctual, perform at a consistent pace, marked meaning there is substantial loss in the ability to effectively function greater than 33 percent. When asked about off task, the Social Worker rated plaintiff as markedly limited in this area, meaning more than 20 percent. And when asked about absences, she opined that plaintiff would be absent three or more days per month.

The administrative law judge considered this opinion in his decision at page 18 of the administrative transcript and found it to be not persuasive, citing as reasons: One, it is not supported by the record; two, while treatment records show anxiety, depression, restlessness and poor eye contact, the plaintiff generally retained appropriate behavior, logical thought process, fair to normal attention, concentration, fair memory, average intelligence, fair insight and judgment; three, denied suicidal or homicidal ideations and reported that his medications worked well at reducing his anxiety, panic attacks, irritability, and depression; and four, he reported that he was able to

manage his own personal care, perform household chores, take his daughter -- take care of his daughter which includes keeping her on a feeding schedule and taking her to doctor's appointments, and take care of his wife, prepare simple meals, shop in stores and by computer and drive.

There is clearly some discussion that allows for meaningful review. These are check-box forms, although that per se does not disqualify a medical source opinion. It is certainly a factor, however, in whether or not it is strong evidence or weak evidence, particularly when there's little explanation. There is explanation on page 578, I will acknowledge, but in my view the ALJ did consider the supportability and consistency of this opinion sufficient to allow meaningful review and I don't find any error in that regard.

The second medical opinion in the record is from Dr. Mary Ann Moore. It is based on an examination of the plaintiff on June 7, 2018, it appears at pages 450 to 454 of the administrative transcript. The plaintiff, it was noted, was appearing to experience a panic attack during the session. The plaintiff was found to have intact attention and concentration, intact recent and remote memory skills, was found to have some limitations including significantly marked limitations regarding the ability to interact adequately with supervisors, coworkers, and the public and

sustain an ordinary routine and regular attendance at work.

The administrative law judge addressed the opinion in page 18 of the administrative transcript, rejected the marked limitation but explained the rejection, and in my view, it was properly explained. The marked limitation on the ability to interact with others, one could argue, is accommodated in the residual functional capacity which is very limiting in terms of interacting with others and certainly coworkers and the public in particular. In my view, there is a proper explanation, and as the Commissioner notes and case law is clear, the administrative law judge is not required to accept any particular opinion in whole.

The third opinion comes from Dr. T. Harding, a psychologist who did not examine the plaintiff but did have available to him some significant treatment records that existed to date, as well as the consultative report of Dr. Moore. His opinion was given on June 13, 2018, it appears at pages 55 to 64 of the administrative transcript. He does find, as counsel has argued, moderate limitation, ability of the plaintiff to perform within a schedule, maintain regular attendance, and be punctual within customary tolerances. There is case law that suggests that a moderate limitation in a mental situation is not necessarily inconsistent with the performance of unskilled work. The mental RFC finding concludes that plaintiff does retain the

ability to perform unskilled work activity, avoiding working closely with others and working directly with the public. This is clearly indicative of plaintiff's ability to perform on a full-time regular basis and the limitations on interaction are in my view accommodated by the residual functional capacity finding.

I agree with the plaintiff, when plaintiff's activities of daily living are considered, that many of the activities of daily living, including denial of suicidal and homicidal ideations, are not necessarily indicative of the ability to perform full-time regular work and go out and be with the public, but as I indicated, plaintiff does take his daughter to her doctor's appointments, he does go out of the house for card games, he has gone out of the house for multiple functions, and he does go weekly to his counselor's appointment. I believe the activities of daily living are relevant and do provide some support, as the administrative law judge found, to the residual functional capacity finding. There is no doubt that plaintiff has significant psychological issues, but in my view, the residual functional capacity finding is supported. I found one entry to be -- well, two factors to be significant. One, plaintiff alleges an onset date of 2010. There are, however, no treatment records until, I believe it was November of 2015, no evidence that he received mental health treatment prior to that time.

One other thing I found significant was an exchange that occurred on page 38 of the administrative transcript. The administrative law judge asked the question, "Well, what if a job could be found that you could just have occasional contact with a supervisor or coworkers and no contact with the public, why couldn't you do something like that? Answer: I spend my time during the day taking care of my wife and daughter." Now he did attempt to backtrack and say that was not the only reason, but clearly that is one suggested reason why he's not working.

The bottom line is the ALJ must assess the RFC based upon the entire record, not just the three medical opinions, does not need to track any one medical opinion. On page 19 the administrative law judge has a paragraph that summarizes the basis for his RFC finding. I cannot find that no reasonable fact finder would conclude as the ALJ did. As I mentioned before, I think the other point raised by the plaintiff, working occasionally with supervisors adequately addresses the concerns in that regard, even Dr. Harding only suggested that the plaintiff not work closely with others. The RFC is more limiting than Dr. Harding because it provides that there will be no contact with the public and so there's no prejudice to the plaintiff in the fact that there is a more restrictive RFC finding in this regard than opined by Dr. Harding.

I agree with the Commissioner's counsel, this is a case where there is conflicting evidence, it's a case where another ALJ or I could have perhaps found in the plaintiff's favor and yet my task is not to determine what I would find or what a reasonable fact finder would find, I have to determine whether the ALJ's finding is supported by substantial evidence and whether no reasonable fact finder could have found or could have concluded as he did, finding the facts related to plaintiff's ability to be on task and meet attendance requirements of full-time work, and I'm not able to make that finding.

So I conclude there is no error in the residual functional capacity determination and therefore the step five determination is not flawed. I will therefore grant judgment on the pleadings to the defendant and order dismissal of plaintiff's complaint. Thank you both, I hope you have a good afternoon.

MR. GORTON: Thank you, your Honor.

MS. VANEGAS: Thank you, your Honor.

(Proceedings Adjourned 10:40 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 23rd day of March, 2022.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter